SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1019

MORRIS BERMAN,

Appellant,

—vs.—

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, *et al.*

JAMES M. POWER, THOMAS MALLEE, MAURICE J. O'ROURKE, JOHN R. CREWS,* J. J. DUBERSTEIN,** *Commissioners,*

Appellee.

* Resigned 1966
** Term started 1966

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF AS TO JURISDICTION

MORRIS BERMAN,
Appellant, Pro Se,
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New York, N. Y., 10001

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Statement

This reply brief as to jurisdiction constitutes the Appellant's reply to the Appellee's motion to dismiss the appeal on the ground that the judgment rests on an adequate non-federal basis. It will be shown that the state's highest court rested its judgment on a *federal* basis, as indicated in the amended remittitur of that court.

Amended Remittitur—Federal Questions Decided

On March 2, 1967 the Court of Appeals of the State of New York, the state's highest court, rendered the following decision on Motion No. 311 in the instant case:

> "Motion to amend the remittitur granted; * * * Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that Section 66 of the Election Law insofar as it authorized the designation of a church as a voting place is in violation of the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that appellant's constitutional rights were not violated."

Non-Federal Questions Not in Issue

Since the Court of Appeals would not have reached the constitutional questions if it could have affirmed on non-constitutional grounds (*Lynch* v. *New York* ex rel. *Pierson* (1934) 293 U. S. 52, 54-55), it is assumed that all of the elements of a complaint in tort were presented in the complaint and were in compliance with the New York Civil Practice Law and Rules. There was no valid reason for affirmance on non-federal grounds as alleged by the Appellee's counsel in his motion to dismiss, which quoted portions of an order of the court of original jurisdiction. A statement showing compliance with the New York civil practice in the complaint in the instant case is given in the Appellant's Jurisdictional Statement and in the following Argument, where figures in parentheses refer to pages in Appellee's Motion to dismiss before this Court:

POINT I

Non-federal grounds were inadequate to support the judgment.

It has already been shown in the Appellant's Jurisdictional Statement that the non-federal grounds stated in the order of the court of original jurisdiction were not in accordance with New York civil practice. For example, inconsistency in the complaint (6) was cited and shown to be unwarranted in fact in the Jurisdictional Statement; but in addition, Rule 3014 of the Civil Practice Law and Rules (Appendix E of the Jurisdictional Statement) states:

> " * * * Separate causes of action or defenses may be stated, *regardless of consistency* * * *."

Appellee states there was no allegation for the basis for damages (6), yet Complaint Paragraph 8 alleges such basis clearly; that there was no basis for the assertion of culpable negligence or malice (6), but on the assumption of unconstitutionality of Section 66 of the election law and the Affidavit the assignment of a church-operated building containing religious symbolism prohibited to be viewed by the Appellant and the unwillingness of Appellee's representative to cover same did, in fact, constitute both culpable negligence and malice; that "the instant action does not appear couched in terms proper to raise the (constitutional) question" (6), but in amending the remittitur (above Statement) the Court of Appeals has in effect ruled that such constitutional questions were properly raised.

Compensatory damages allegedly asked by Appellant as stated on Page 2 of Appellee's motion to dismiss could be erroneously interpreted as quadrupled, though unambiguously stated on Page 3 of said motion. The Appellee's motion to dismiss in the court of original jurisdiction made a fuller consideration of damages difficult, and the jurisdiction of this Court does not generally extend to the assessment of damages.

STERN AND GRESSMAN, *Supreme Court Practice* (1962) states (P. 106):

> "It is established law that this Court is not fully concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right."

POINT II

The State's highest Court passed upon constitutional issues.

In its amendment to the remittitur (Statement above) the state's highest court ruled that it had passed upon constitutional issues and held that the appellant's constitutional rights were not violated, which ruling is now being appealed in this Court.

POINT III

Inseparability of federal and non-federal grounds confers jurisdiction.

> "Where the non-Federal ground is so interwoven with the other (federal) as not to be an independent matter * * * our jurisdiction is plain" (*Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164).

In the instant case the constitutional issue is so interwoven with and inseparable from the non-federal questions that the Court's jurisdiction is apparent.

CONCLUSION

In view of the amended remittitur which shows the consideration of the federal questions on appeal before the state's highest court, the court having reached the constitutional issue and thus having recognized the validity of the non-federal portions of the Complaint, and in view of the inseparability of the federal and non-federal issues in this case, it is respectfully submitted that probable jurisdiction is conferred upon this Court.

Respectfully submitted,

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March 9, 1967